Supreme Court, U. S.
FILED
FEB 15 1979
MODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, ET AL.,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

Appellees.

(continued on inside front cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OPPOSING U.S. MOTION TO DISMISS

SLADE GORTON,
Attorney General,
State of Washington

RICHARD H. HOLMQUIST,
Senior Assistant Attorney General

MATTHEW J. COYLE,
Assistant Attorney General
Attorneys for Appellants.

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, ET AL.,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

Appellees.

(continued on page ii)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OPPOSING U.S. MOTION TO DISMISS

SLADE GORTON,
Attorney General,
State of Washington

RICHARD H. HOLMQUIST,
Senior Assistant Attorney General

MATTHEW J. COYLE,
Assistant Attorney General
Attorneys for Appellants.

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

STATE OF WASHINGTON,

Appellant,

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

INDEX

		Page
I.	INTRODUCTION	1
II.	ARGUMENT IN ANSWER TO CONTENTIONS OF THE UNITED STATES	3
	A. A 3-judge court was properly convened because the complaints of the United States and intervenor Yakima Indian Nation raised a substantial federal question under the Interstate Commerce Clause, U.S. Const., Art. 1, §8	3
	B. A major policy underlying 28 U.S.C. §2281—accelerated review on the merits of injunctions affecting important state policies—is not served by routing this case through the Court of Appeals	7
III.	CONCLUSION	9

CASES

American Home Assurance Co. v. Cessna Aircraft Co., 551 F.2d 804 (10th Cir. 1977) 6

Angelica Co. v. Goodman, 52 Misc.2d 844, 276 N.Y.S.2d 766 (1966) 4

Butler v. Dexter, 425 U.S. 262 (1976) 3

Commonwealth v. Flickinger, 165 Pa.Super. 95, 67 A.2d 779, affirmed, 73 A.2d 652, 365 Pa. 59, cert. denied, sub nom. Flickinger v. Commonwealth, 340 U.S. 843, 95 L.Ed. 618, 71 S.Ct. 33 (1950) ... 4

Ex Parte Poresky, 290 U.S. 30 (1933) 3

Goosby v. Osser, 409 U.S. 512 (1973) 3

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 5, 6

People v. Asta, 337 Mich. 590, 60 N.W.2d 472 (1953) 4

People v. Locrichio, 342 Mich. 210, 69 N.W.2d 723 (1955) 5

State v. Sedacca, 249 A.2d 456 (Md. Ct. App. 1960) 4

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 3, 7

CONSTITUTIONAL AND STATUTORY PROVISIONS

	Page
U.S. Const., Art 1, §8	3
28 U.S.C. §1253	7, 8
28 U.S.C. §2281	2, 3, 4, 7, 8
RCW 82.24.040	4, 5, 6, 7, 10
RCW 82.24.250	4, 5, 6, 7, 12

RULES OF COURT

Supreme Court Rule 16(4)	2

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, ET AL.,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OPPOSING U.S. MOTION TO DISMISS

I. INTRODUCTION

This brief is in opposition to the Motion to Dismiss belatedly filed by Appellee United States[1] and

[1]In footnote 1 (p. 2) of our Brief Opposing Motions to Dismiss or Affirm, we noted that the last extension of time for the United States to file its Motion to Dismiss or Affirm had expired on January 8, 1979, that the United States had not filed its Motion as of that day, and that Washington State reserved the right to submit a reply to any Motion filed by the United States subsequent to its last extension. Not until February 6, 1979, did we receive telephone notification that the United States intended to file its Motion, some five weeks after the expiration of the last extension granted to United States for filing this Motion, and we did not receive the Motion until late February 12, 1979.

is submitted pursuant to Rule 16(4) of the Supreme Court Rules.

In its Motion to Dismiss, the United States contends that this Court lacks jurisdiction to entertain this appeal insofar as the United States is a party because the three-judge District Court was not required under 28 U.S.C. §2281.[2]

The arguments advanced by the United States are without merit. A three-judge court was properly convened because the complaints of the United States and intervenor Yakima Indian Nation—and the subsequent pre-trial order—raised substantial issues under the interstate commerce portion of the Commerce Clause. Furthermore, this eleventh hour[3] attempt by the United States to delay the ultimate resolution of this immensely important lawsuit flies in the face of a crucial policy underlying the enactment of 28 U.S.C. §2281—accelerated review on the merits of injunctions restraining the operation of important state policies. This Court should reject the position of the United States, note probable jurisdiction, and set the case for full briefing and argument on the

[2]28 U.S.C. §2281 was repealed by Act of August 12, 1976, Pub. L. No. 94-381, §1, 90 Stat. 1119. However this action is not affected since it was pending on the date of the repeal. At the time the three-judge District Court was convened to hear this cause 28 U.S.C. §2281 provided:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer or such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2281 of this title."

[3]See note 1, *supra*.

merits. Additionally, as noted by the United States, its Motion to Dismiss goes only to the "Yakima" appeal (No. 3909 below). The "Colville" appeal (No. 3868 below) was not consolidated for judgment and is properly grounded jurisdictionally. Therefore the Court's disposition of the "Yakima" appeal should not affect its disposition of the "Colville" appeal. See, *Butler* v. *Dexter*, 425 U.S. 262 (1976).

II. ARGUMENT IN ANSWER TO CONTENTIONS OF THE UNITED STATES.

A. A 3-judge court was properly convened because the complaints of the United States and intervenor Yakima Indian Nation raised a substantial federal question under the Interstate Commerce Clause, U.S. Const. Art. 1, §8.

As a general rule, 28 U.S.C. §2281 required the convening of a three-judge court wherever the enforcement of a state statute was sought to be enjoined on the grounds of its unconstitutionality. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). A three-judge court was not required where the claim of unconstitutionality was either "insubstantial", *Ex Parte Poresky*, 290 U.S. 30 (1933), or based on Supremacy Clause grounds, *Swift & Co.* v. *Wickham*, *supra*.

More recently, in *Goosby* v. *Osser*, 409 U.S. 512 (1973) this Court explained the standard to be applied in judging whether a constitutional claim is or is not substantial for 28 U.S.C. §2281 purposes.

> "A claim is insubstantial only if 'its unsoundness so clearly results from the previous decis-

ions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " 409 U.S. at 518.

The three-judge court below found §2281 jurisdiction because the state sought to enforce the Tribes' asserted state cigarette tax collection responsibility by enforcing *state statutes* declaring and seizing as contraband unstamped cigarettes moving in interstate commerce to the Tribes' reservations. Consolidated Decision, Jur.St.App., p. 14.[4] In the lower court's view, the enforcement of these statutes raised substantial questions under the Commerce Clause.

The court was clearly correct. Classification of unstamped cigarettes as contraband and seizure thereof while moving in the stream of interstate commerce plainly raise issues under the Commerce Clause. Such state action has generated considerable litigation in the lower courts. See, e.g. *State* v. *Sedacca*, 249 A.2d 456 (Md. Ct. App., 1960); *Angelica Co.* v. *Goodman*, 52 Misc.2d 844, 276 N.Y.S.2d 766 (1966); *People* v. *Asta*, 337 Mich. 590, 60 N.W.2d 472 (1953); *Commonwealth* v. *Flickinger*, 165 Pa.Super. 95, 67 A.2d 779, affirmed, 73 A.2d 652 365 Pa. 59, cert. denied, sub nom. *Flickinger* v. *Commonwealth*, 340 U.S. 843,

[4]The state statutory scheme dealing with contraband cigarettes moving in interstate commerce to Indian tribes is as follows: Unstamped cigarettes, except those consigned to an Indian tribe authorized by the state to possess unstamped cigarettes, are contraband and subject to seizure and sale. RCW 82.24.250 (Appendix B hereto). Indian tribes are not authorized to possess unstamped cigarettes where the tribe makes sales to non-Indians. RCW 82.24.040. (Appendix A hereto). It is undisputed that the Tribes are making substantial sales to non-Indians, and hence *all* cigarettes bound for the Tribes are contraband and subject to seizure and sale under state statutes.

95 L. Ed. 618, 71 S.Ct. 33 (1950); *People* v. *Locrichio*, 342 Mich. 210, 69 N.W.2d 723 (1955).

The issues involve state interference with interstate commerce to enforce a tax on goods arising at the time the goods enter intrastate commerce; certainly these issues are sufficiently "substantial" to merit consideration by a three-judge panel. This is particularly so where this Court has never passed directly on the issues as applied to cigarettes; indeed, the Court specifically reserved the entire question of cigarette tax enforcement in *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation, supra.* See, *Moe*, 425 U.S. 15 468, n.6.

Finally, contrary to the United States' allegation, the court below did not ignore the distinction between the unconstitutionality of a state statute, on its face or as applied, and the unconstitutionality of the result obtained by use of a statute not attacked as unconstitutional. U.S. Motion to Dismiss, pp. 9-10. The court characterized the claim of the Tribe and the United States as a "*challenge of the State's statutes* providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce." Consolidated Decision, Jur.St.App. 14 (emphasis supplied). These state statutes were, of course, RCW 82.24.040 and 82.24.250, App. A and B hereto respectively.[5]

[5]True, the lower court did not specify the state statutes being challenged, nor did the parties do so in the several complaints or pre-trial orders. But there is no requirement that the challenged

In the context of the case at the time it went to trial, the challenge was to these statutes. *Moe, supra*, had already been decided, and it appeared (at least

statutes be set forth chapter and verse, so long as it is clear what statutes are being challenged. Here, it is clear from the pre-trial order filed February 28, 1977, that the state statutes dealing with contraband cigarettes moving in interstate commerce, RCW 82.24.040 and 82.24.250, were in issue. In that pre-trial order the United States characterized a part of its requested relief as follows:

"2.2 *Threatened Seizure of Shipments to Tribe.* Against the State, its agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband cigarettes and tobacco products upon which state taxes have not been paid being shipped from outside the State to the Tribe intended for resale to licensed Indian retailers on trust property within the Yakima Indian Reservation for eventual resale to persons who are not members of the Tribe." Pre-Trial Order, p. 3.

The United States contended.:

"The seizure of unstamped cigarettes being transported to the Yakima Indian reservation in commerce by the state of Washington to enforce collection of cigarette taxes on sales by licensed Indian retailers to non-Indians is a violation of the commerce clause and the supremacy clause of the Constitution." Pre-Trial Order, p. 22.

In response, the state contended:

"9.5 Washington may classify as 'contraband' cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the Tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiff-intervenor's Indian reservation or are in transit in interstate commerce to plaintiff-intervenor's Indian reservation from points outside the state." Pre-Trial Order, p. 28.

The parties agreed that one of the issues for resolution was as follows:

"10.5 Assuming the State has the authority to require the Yakima Indian Nation and/or its licensed Indian retailers to collect and remit taxes on such [cigarette] sales, may the State enforce collection of such taxes by confiscating as contraband cigarettes or other personal property within the State which is being shipped in commerce to the Yakima Indian Nation for resale to non-members of the Tribe?"

In sum, it is abundantly clear from the pre-trial order that all parties were referring to state statutes (albeit not by statutory citation) dealing with classification and seizure as contraband unstamped cigarettes moving in interstate commerce to the Yakima Indian reservation, i.e, RCW 82.24.040 and 82.24.250.

In the lower federal courts it is recognized that a pre-trial order sets the dimensions of the case and controls the subsequent course of the action, both at trial and on appeal. See, e.g. *American Home Assurance Co.* v. *Cessna Aircraft Co.*, 551 F.2d 804 (10th Cir. 1977). Thus, even assuming that the complaints did not seek injunctive relief on Commerce Clause grounds, that claim was before the lower court at the time it issued its permanent injunction—the order which is the subject of this appeal, and should be regarded as controlling for purposes of this Court's appellate jurisdiction under 28 U.S.C. §1253.

to the state and the circuit court member of the 3-judge panel) that the only remaining controversies dealt with permissible methods of enforcing the tribally-licensed retailers' cigarette tax collection responsibility. One method was *the statutorily required* contraband procedure, RCW 82.24.040 and 82.24.250 —a statutory method clearly under challenge as applied.

The lower court understood—correctly—that these statutes were under challenge. At all stages of this litigation, from the filing of the complaint through final briefing and argument on the merits, the United States and the Tribe were attacking these statutes in large part on Commerce Clause grounds. To now claim otherwise is totally inconsistent with the record and at variance with the United States' representations to the court below. On this basis alone the Court should reject the arguments of the United States.

B. A major policy underlying 28 U.S.C. §2281—accelerated review on the merits of injunctions affecting important state policies—is not served by routing this case through the Court of Appeals.

As noted by this Court in *Swift & Co.* v. *Wickham*, 382 U.S. 111 at 119-120, the three-judge court procedure

> "* * * authorizes direct review by this Court, 28 USC §1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal

through the circuit courts to the Supreme Court, and the consequent disruption of state and regulatory policy caused by the outstanding injunction."

Here, to adopt the strained, hypertechnical position of the United States would do violence to the congressional policy of accelerated review of orders granting injunctions. The operation of important state tax policies are being disrupted by the injunction entered by the court below.[6]

There are no countervailing policy considerations dictating review of this case by the Court of Appeals. With the repeal of 28 U.S.C. §2281 in 1976, there is no longer any concern about minimizing this Court's mandatory docket in the interests of sound judicial administration. There is no reason to believe that this Court will benefit from additional analysis by the Court of Appeals—the issues were fully briefed by the parties and the court below entered an exhaustive opinion.

In short, justice is best served here by construing 28 U.S.C. §§ 2281 and 1253 as authorizing direct Supreme Court review of this case. The United States has offered no policy reasons—and we know of none—to delay ultimate resolution of the enormously important issues raised in this appeal. Further delay will only serve to exacerbate the controversy between

[6]The state is presently litigating these same issues with virtually every major Indian tribe in Washington. As a result of the injunction entered in the instant case, the state has felt obligated to enter into stay orders in this other litigation, agreeing not to enforce its cigarette tax on sales by reservation Indians to non-Indians. This has resulted in a revenue loss to the state currently running at an estimated $15 Million per year.

the parties and will contribute nothing to its correct resolution.

III. CONCLUSION

For the foregoing reasons, the State urges this Court to deny the United States' Motion to Dismiss; note probable jurisdiction; and set this appeal for full briefing and argument on the merits.

DATED this 14th day of February, 1979.

Respectively submitted,

SLADE GORTON,
Attorney General,
State of Washington

RICHARD H. HOLMQUIST,
Senior Assistant Attorney General

MATTHEW J. COYLE,
Assistant Attorney General
Attorneys for Appellants.

APPENDIX A

Revised Code of Washington Section 82.24.040

82.24.040 Duty of Wholesaler. Every wholesaler in this state shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided*, That any wholesaler who furnishes surety bonds in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales to persons in another state or foreign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such unstamped stock shall be kept separate and apart from stamped stock: *Provided further*, that every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, or to a federal instrumentality, or to an Indian tribal organization, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the main office of the department, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this section the department may revoke the

permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed. The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe.

APPENDIX B

Revised Code of Washington Section 82.24.250

82.24.250 Transportation of unstamped cigarettes —Invoices and delivery tickets required—Stop and inspect. Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the cigarettes so transported. If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state

seller or consignor and such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer licensed pursuant to the provisions of chapter 19.91 RCW, the United States or an agency thereof, and any Indian tribal organization authorized to possess unstamped cigarettes.